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Docket No.

IN THE

UNITED STATES SUPREME COURT

IN RE: JEFFERSON A. McGEE

Petitioner;

On Petition For Writ Of Certiorari To The United States Court of Appeals In And For The Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Petitioner below and, Petitioner here, a state prisoner filed an application for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of California, on January 19, 2010. Petitioner challenged the Sacramento County conviction for brandishing a weapon. Relevant federal statutes provide, "(a) ... a district court shall entertain an application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Jefferson McGee, has been ordered and refuses to pay a $100.00 restitution fine pursuant to a judgment of the Superior Court of Sacramento County . Petitioner is opposing the District Court's findings that he is not in custody pursuant to the state court's judgment. The United States Court of Appeals For The Ninth Circuit pursuant to a pre-filing order has refused to hear petitioner's challenge on appeal. Thus the question presented in this petition is:

May the United States Court of Appeal In And For The Ninth Circuit pursuant to a pre-filing order dismiss petitioner's appeal of the district court's order dismissing his application for a writ of habeas corpus before the question of whether petitioner was "in custody" when he commenced this action and was heard on the merits.

PARTIES TO THE PROCEEDINGS

The following petitioner asserted claims in the trial court:

Jefferson A. McGee

The following respondent asserted no defense in the trial court:

The Attorney General, State of California

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Petitioner affirms that he has no parent company and is not a publicly-owned company.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeal In And For The Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeal In And For The Ninth Circuit is reprinted at App. 1. The opinions of the United States District Court In And For The Eastern District of California are reprinted at App. 2 – App. 3. None of the opinions have been published.

JURISDICTION

The United States Court of Appeal In And For The Ninth Circuit issued its initial opinion in this case on May 20, 2010. No petition for rehearing was filed by petitioner. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Title 28 U.S.C. § 2254. State custody; remedies in Federal Courts.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district judge shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the grounds that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that-

a. The applicant has exhausted the remedies available in the courts of the state; or

b.

i. There is an absence of available state corrective process; or

ii. Circumstances exist that render the process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the Courts of the States.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the States, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State court

proceedings unless the adjudication of the claim –

(1) Resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) Resulted in a decision that was based on an unreasonable determination of facts in light of the evidence presented in the State court proceeding.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an

evidentiary hearing on the claims unless the applicant shows that –

(A) The claim relies on –

i. A new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable.

ii. A factual predicate that could not have been previously discovered through the existence of due diligence; and

(B) The facts underlying the claim would be sufficient to establish clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offence.

(f) If the applicant challenges the sufficiency of the evidence advanced in such State court proceeding to support the State Court's determination of a factual issue made therein, the applicant, if able, shall produce the parts of the record pertinent to a determination of the sufficiency of the

evidence to support such determination. If the applicant, because of indigence or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal Court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the Court shall determine under the existing facts and circumstances what weight shall be given to the State Court's factual determination.

(g) A copy of the official records of the State Court, duly certified by the clerk of such court to be true and correct copy of a finding, judicial opinion, or other reliable written indicia showing a factual determination by the State Court shall be admissible in the Federal Court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Act, in all proceedings brought under this section and any subsequent proceedings on review, the Court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority.

Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under § 2254.

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INTRODUCTION

This case questions whether, a Court of Appeals after imposing a pre-filing requirement can preclude an appellant from proceeding with an appeal of the district court order dismissing an application of habeas corpus when it is clear from the fact set out in the documents that: (1) the appeal challenged the definition of the "in custody" requirements, and (2) the facts presented by the application for writ of habeas corpus and the accompanying documents showed the judgment of the State Court to be in violation of the Constitution and laws of the United States. More specifically, the question is may the United States Court of Appeals in and for the Ninth Circuit dismiss petitioners appeal of the district court's order dismissing his application for a writ of habeas corpus pursuant to a pre-filing order, before

the question of "whether the $100.00 restitution fine petitioner had been ordered to pay as a condition of his probation satisfied the "in custody" requirement of *28 U.S.C. § 2254* when he commenced his habeas corpus action," was heard on the appeal. The United States Court of Appeal for the Ninth Circuit held that such dismissal was allowed. Whether it was right should be reviewed by this Court.

Precluding an appellant from proceeding with an appeal pursuant to a pre-filing order restricts access to the court, and therefore must be based on adequate justification supported in the record and narrowly tailored to address the abuse perceived. The Court of Appeal can only do so if:

(1) The appeal is patently insubstantial or clearly controlled by well settled precedent, or
(2) The facts presented are fanciful or in conflict with facts of which the court may take judicial notice.
In re Thomas 508 F. 3d 1225 (9th Cir. 2007)

Furthermore, a federal statute provides as follows:

> *"a district court shall entertain an application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the grounds that he is in custody*

> *in violation of the Constitution or laws or treaties of the United States."*

28 U.S.C. § 2254(a)

It is unquestionable that the United States District Court for the Eastern District of California had jurisdiction under *28 U.S.C. § 2254* to entertain an application for a writ of habeas corpus from a petitioner who is being restrained in his liberty in violation of the Constitution and laws of the United States. *Jones v. Cunningham 371 U.S. 236.* The question in this case is whether petitioner who is presently obligated under the terms of his probation to pay a $100.00 restitution fine is "*in custody*" within the meaning of *Title 28 U.S.C. § 2254*, so that he can challenge his Sacramento County conviction for brandishing a weapon.

The United States District Court for the Eastern District of California held petitioner had failed to show that the court had jurisdiction over his application for writ of habeas corpus and dismissed the matter. See *App. 2 - App. 4.* According to the district court the $100.00 restitution fine that petitioner had refused to pay did not satisfy the "*in custody*" requirement of *Title 28 U.S.C. § 2254.* The district court held: "the court does not assume that simply because petitioner has refused to pay the

restitution fine that petitioner is still on probation." *App. 3-4.*

Respectfully, this holding is perplexing. The district court, whose opinion was essentially adopted by the United States Court of Appeal For The Ninth Circuit is in conflict with this Court's decision in several cases. *Title 28 U.S.C. § 2254* gives a district court jurisdiction to entertain petitions for habeas relief only from persons who are "*in custody*" in violation of the Constitution and laws or treaties of the United States. *Maleng v. Cook 490 U.S. 488 (1989)* quoting *Cartes v. La Valles 391 U.S. 234, 238.* This Court in *Jones v. Cunningham 371 U.S. 236* held that a person who has been placed on probation was still "*in custody*" under his unexpired sentence. The Court reasons that petitioner's release from physical confinement under the sentence in question was not unconditional, instead, it was explicitly conditioned on his reporting regularly to his parole officer, remaining in a particular community, residence, and job and refraining from certain activities. In this action, petitioner's probation was conditioned on petitioner's completion of ten days community service and the payment of a $100.00 restitution fine. The district court acknowledged that petitioner refused to pay the $100.00 restitution fine but rejected petitioner's contention that he was on probation when he commenced the habeas corpus

action. Petitioner is entitled to have his appeal heard on the merits.

In addition to not completing his terms of probation the collateral consequences of the unconstitutional conviction are in themselves sufficient to render petitioner "*in custody*" for the purpose of a habeas corpus action. This Court entertained the issue of whether the collateral consequences of a conviction may reach the threshold of the "*in custody*" requirement. *Maleng v. Cook supra.* This issue should be resolved. The unlawful conviction at issue in this matter is infringing on petitioner's second amendment rights bear arms. The people of the State of California have not returned petitioners .22 caliber handgun as a result of the conviction. Petitioners ability to purchase a hand gun is effected under the conviction. The conviction is defamatory and is damaging petitioner's business reputation and his freedom of obtaining business licenses the same as other persons. The conviction significantly restrains petitioner's liberty to do the thing in this country free men are entitled to do. Such restraints are enough to invoke the help of the Great Writ. The writ of habeas corpus has "not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose – the protection of individuals against the erosion of their right to be free from wrongful restraint upon their liberty." *Jones v. Cunningham Supra.*

The question of whether petitioner is in custody pursuant to the State court judgment as required by *28 U.S.C. § 2254* is substantially enough to be heard on appeal, and the verified petition for writ of habeas corpus and the accompanying documents shows the judgment of the Superior Court of California In And For The County of Sacramento and the appellate procedure in the California Court of Appeal In And For The Third Appellate District to be in violation of the Constitution and laws of the United States. The definition of "*in custody*" should be settled by this Court.

This question is important for the public and the legal profession, and is squarely presented by this case. Congress has by way of *Title 28 U.S.C. § 2254* expressed a significant national interest in protecting citizens' from unconstitutional restraints on their liberty. At the same time, the use of pre-filing orders by the Court of Appeals has become necessary to prevent the abuse of its' docket by vexatious litigants. *In re Thomas*. The Court's interest in managing its docket should not outweigh petitioner's right to be heard on appeal in this particular case. Whether the interest of the nation and Congress is interfered with by precluding appellant from proceeding on appeal pursuant to a pre-filing order in cases such as this one is at stake in this case. The question merits review by this Court.

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STATEMENT OF CASE

A. Factual Background.

This is a habeas corpus action. After a dispute with a tow truck driver who was attempting to repossess (steal) his car, petitioner Jefferson A. McGee was charged with personally using a firearm to assault the victim (Pen. Code §§ 245, Subd. (9)(2), 12022.2(a) & (d).) Petitioner entered a negotiated plea of no contest to a lesser related offence of misdemeanor brandishing a weapon. (Pen. Code § 447, Subd. (a)) and was placed on informal probation for three years. As a condition of the informal probation he was ordered to complete ten days of community service, with two days credit for time served, and to pay a $100.00 restitution fine. (Pen. Code § 1204). Petitioner appealed the judgment of conviction and sentencing. Petitioner has not paid the $100.00 fine. The facts leading to the criminal proceedings are set out as follows: App. 3-4

On December 15, 2003, an automobile finance company and a tow truck company began working in concert to unlawfully collect a debt from petitioner. The finance company and tow truck company conspired to send a tow truck driver to petitioner's

residence located at 8553 Iris Crest Way Elk Grove, California 95624 to steal petitioner's car and to unlawfully take other property belonging to petitioner. . Later, on December 15, 2003, the tow truck driver arrived at petitioner's residence and began committing the following crimes: assault with a deadly weapon, kidnapping, robbery, burglary, and trespassing in an attempt to steal petitioner's car and other property. Petitioner arrived at his residence while the tow truck driver was committing the above listed crimes and used moderate means to eject him off his residence.

Later, on December 15, 2003, the tow truck driver summoned the County of Sacramento Sheriff's Department and the City of Elk Grove's Police Department to aid in the conspiracy to use unlawful mean to collect a debt from petitioner.[1] After being summoned by the tow truck driver, the Elk Grove Police Department sent at least three officers to petitioner's residence. The officers arrived at petitioner's residence and discriminated against petitioner because of his race and color by aiding the tow truck driver in his attempt to steal petitioner's car and unlawfully collect a debt from petitioner. Petitioner was African American and the tow truck

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[1] During the time of the events described in the petition for habeas corpus the City of Elk Grove and the City of Citrus Heights had a contract with the Sacramento County Sheriff's Department to provide for their law enforcement services for the cities.

driver was European American. The Sacramento County Sheriff Department and its deputies and the City of Elk Grove's Police Department and its officers began to aid the finance company and tow truck company in their attempt to collect a debt from petitioner by intimidating petitioner and people at petitioner's residence with threats of arrest and threats of violence. The County of Sacramento, the City of Elk Grove and their deputies and officers then swore out a false crime report stating that petitioner had carjacked his own car and used terrorist threats to do so. The City of Elk Grove then placed petitioner's car on the Stolen Vehicle System while having actual knowledge that petitioner's car had not been stolen. The City of Elk Grove only removed the car from the list after petitioner had paid the finance company money. On December 17, 2003, after petitioner had refused to give the tow truck driver petitioner's car, the City of Elk Grove sent deputies to petitioner's residence to forcibly steal petitioner's .22 caliber Baretta handgun to use it as evidence in their racially motivated criminal prosecution. The State of California continue to hold petitioner's .22 caliber Baretta handgun to this day.

B. Proceedings Below.

On December 19, 2003, officers from the Sacramento County Sheriff's Department and the City of Citrus Heights Police Department went to

petitioner's residence located at 8553 Iris Crest Way Elk Grove, California 95624 armed with guns, sticks, sprays, and other dangerous weapons, seized control of petitioner, placed petitioner in handcuffs and transported petitioner to the Sacramento County jail without cause or a warrant and without petitioners consent. While petitioner was being unlawfully held in jail, the district attorney of Sacramento County, Jan Scully, initiated the criminal prosecution entitled *the People of the State of California v. McGee No. 03F11189* by filing an unsigned complaint and an unsigned holding order in the Superior Court of California, County of Sacramento. The unsigned complaint alleged petitioner had committed two violent felonies against the tow truck driver. The People of the State of California initiated the criminal action against petitioner solely because he was African American and lawfully prevented two European American men from unlawfully taking his property and assaulting his family.

On January 8, 2004, the Superior Court of California, County of Sacramento appointed the Public Defender of Sacramento County to represent petitioner in the matter of *the People v. McGee 03F11189*. The Attorney General of the State of California and the District Attorney of Sacramento County prosecuted the above-mentioned action against petitioner although both officers were embroiled in civil litigation with petitioner. From

January 8, 2004 through May 16, 2005 the Public Defender of Sacramento County refused to file a motion to dismiss, a motion to recuse the district attorney's office from prosecuting the case, and to conduct any meaningful discovery. The public defender neglected to file motions to dismiss although it was clear the action was initiated with unsigned documents and petitioner and the prosecutor were embroiled in civil litigation.

On February 6, 2004, petitioner removed the action of the *People v. McGee No. 03F11189* to the United States District Court for the Eastern District of California. The matter was entitled *McGee v. The People of the State of California No. Civ.-S-04-0283 GEB KJM PS*. During the proceedings in the district court, the People of the State of California refused to answer the summons and refused to comply with a subpoena issued from the district court. On April 27, 2005, the District Attorney of Sacramento County filed information in the California Superior Court, County of Sacramento alleging petitioner had violated Cal. Penal Code § 245(a)(2). The People of California and the Public Defender of Sacramento delayed bringing petitioner to trial for over a year without cause or explanation. On May 16, 2005, petitioner entered a negotiated plea of no contest to a lesser related offence of misdemeanor brandishing a weapon because the public defender had refused to represent

petitioner as required by the Sixth and Fourteenth Amendments of the United States Constitution.

Petitioner appealed the judgment and sentencing in the matter of *the People v. McGee No. 03F11189* to the California Court of Appeal For The Third Appellate District. The action was entitled *the People v. McGee No. C049881*. The Court of Appeal for the Third Appellate District appointed an attorney to represent petitioner on the appeal. Petitioner's appellant-counsel read the entire record of the trial court and then sent petitioner a letter dated October 15, 2005. In the letter appellant's-counsel advised appellant: of the nature of his opening brief; that he would serve a copy of the opening brief on appellant; that appellant may file a supplemental brief within 30 days of his filing of the opening brief on appellant's behalf; that he would remain available to brief issues as required by the court; and that appellant may file a request of the Court to relieve him as counsel in this appeal. Appellant's counsel provided appellant a copy of the record on appeal to aid appellant in his preparation of a supplemental brief. Appellant's counsel did not advise the Court of Appeal that the appeal was wholly frivolous and did not request permission from the Court of Appeal to withdraw as appellant's counsel. The opening brief asked the Court of Appeal to review the record and determine whether there were any arguable issues on appeal. The opening brief raised no specific issues. The Court of

Appeal undertook an examination of the entire record, and found no arguable error that would result in a disposition more favorable to appellant and affirmed the judgment.

On January 14, 2009, petitioner petitioned the Court of Appeal of the State of California for the Third Appellate District for a writ of habeas corpus contesting the constitutionality of the appellate procedure in the matter of *the People v. McGee No. C049881*. The action was entitled *In re McGee No.* C060841. The petition for writ of habeas corpus set forth facts showing: (1) petitioner who was indigent was appointed counsel; (2) petitioner's court appointed counsel made an examination of the case and wrote petitioner a letter advising him to shift for himself; (3) petitioner's court appointed counsel filed an opening brief on behalf of petitioner that set forth the facts in the action but raised no specific issues; (4) the Court of Appeal was left to review the record on appeal without an advocate acting on behalf of petitioner; (5) the Court of appeal affirmed the judgment without the aid of an active advocate acting on behalf of petitioner; (6) petitioner was prejudiced by his court appointed counsel's failure to act as an active advocate; and (7) the result would have been different but for counsel's errors. Petitioner claimed the appellant procedure denied him the rights under the Sixth and Fourteenth Amendments of the United States Constitution to the effective assistance of

counsel. Petitioner cited *Strickland v. Washington (1984) 466 US 668*; *People v. Wende (1979) Cal. 436, 158 Cal Rptr. 839, 600 P 2d 107*; *Anders v. California (1967) 386 US 728*; *Tumey v. Ohio (1926) 273 US 522*; and *the People v. Miller 72 CA 607* as authority. The Court of Appeal of the State of California for the Third Appellate District denied the petition without holding a hearing.

On July 14, 2009, petitioner filed a writ of habeas corpus in the California Supreme Court setting forth most of the same facts and contentions that were set out in his petition of habeas corpus in the California Court of Appeal For The Third Appellate District action entitled *In re McGee No. C060841.* The Supreme Court of California denied the petition for writ of habeas corpus without explanation. On January 19, 2010, petitioner filed this action in the United States District Court for the Eastern District of California. The case was entitled *McGee v. Attorney General of the State of California No. Civ. 10-0137 KJM P.* See *App 4- App. 6.* The United States District Court for the Eastern District of California denied the application for writ of habeas corpus on the ground that it lacked jurisdiction to entertain the application for writ of habeas corpus because petitioner had not shown he met the "*in custody*" requirement. On April 22, 2010, petitioner appealed the district court's decision to dismiss his application for a writ of habeas corpus to the United States Court

of Appeal for the Ninth Circuit. The case was entitled *In re: Jefferson A. McGee No. 02-800374.* On May 20, 2010, the United States Court of Appeal for the Ninth Circuit denied petitioners appeal pursuant to a pre-filing order without ruling on the merit. Here the matter now stands.

Thus, to reiterate for purposes of Supreme Court Rule 14.1(g)(ii), petitioner has exhausted the remedies available to correct the illegal judgment in the Courts of the State of California. Petitioner has sought relief from the unconstitutional and unlawful judgment in the California Court of Appeal For The Third Appellate District and the California Supreme Court. Petitioner also sought relief in the United States District Court for the Eastern District of California, and the United States Court of Appeal for the Ninth Circuit. Thus, petitioner's only remedy is this Court and this Court has jurisdiction.

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REASONS FOR GRANTING THE PETITION THE NINTH CIRCUIT COURT OF APPEAL DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

This Court's Rules direct that "a petition for certiorari will be granted only for compelling reasons."

S. Ct. 10. Some compelling reasons are where a United States court of appeal has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. 10(c). This case is one such compelling case.

Certain points council for this Court's review are indisputable. First, based on the application for writ of habeas corpus it is clear that the conviction, sentencing, and appellate procedure violate the Constitution and laws of the United States. With the existence of the unconstitutional judgment that it is depriving a person of liberty and property, comes the need for this Court to use its discretion and the statutes enacted by Congress to correct the unconstitutional judgment that is violating the Constitution and laws of the United States. The correction is needed in order to protect the integrity of the Constitution and the laws of the United States. The statute at issue here is one designed to correct such an error. Its reach and effect is of critical importance to persons illegally deprived of their liberty by unconstitutional an unlawful judgments.

As technology has made information pertaining to arrests and convictions of crimes more accessible to the public, significant public interest is attached to defining the precise parameters in which to correct its

unlawful or unconstitutional judgments, or conversely a more precise definition of "*in custody*" requirement for the habeas corpus statutes. This interest is heightened in this case because the $100.00 restitution fee is a condition of petitioners probation on a judgment obtained for the purpose of punishing petitioner for exercising and asserting his rights secured by the Constitution and laws of the United States, rather than compensation for the actual losses flowing from the offence for which the petitioner was convicted. The $100.00 restitution fine was unlawful at the time of the plea agreement and thus the mere pendency of the restitution fine violates petitioner's rights secured by the Constitution and laws of the United States. Whether federal law directing a district court to entertain an application for a writ of habeas corpus only on the ground the applicant is in custody precluded the district court from entertaining petitioners application is a significant issue of federal law meriting this Court's consideration.

This Court has already held that a person who has been placed on probation was still "*in custody*" under his unexpired sentence. *Jones v. Cunningham 371 U.S. 236.* In this case petitioner's release was not unconditional. Petitioner is required to pay $100.00 to satisfy an unconstitutional judgment. The issue of whether a person on probation is in custody has been decided by this Court. Whether being obligated to pay a $100.00 restitution fine as a condition of probation

satisfies the "*in custody*" requirement of *Title 28 U.S.C. § 2254* is a question that should have been heard on the merits in the United States Court of Appeal for the Ninth Circuit. Instead the Ninth Circuit Court of Appeal simply decided with little or no analysis that the appeal was, "so insubstantial as to warrant further review, it shall not be permitted to proceed." *App. 1.* Thus, the Ninth Circuit Court of Appeal has precluded petitioner from proceeding with his appeal pursuant to pre-filing order without adequate justification supported by the record. The Ninth Circuit Court of Appeal's decision is in conflict with its own decision in the matter *In re Thomas 508 F 3d 1225 (9th Cir. 2007).* While it would be too much to argue that the decision to preclude petitioner's appeal from proceeding conflicts with this Court's precedent directly, it does run counter to reasoning in important precedent in this respect it reaches far beyond protecting the public and the Court's docket from a vexatious litigant in this case. Thus, this Court should accept this case to clarify whether a United States Court of Appeal may dismiss an appellant's appeal pursuant to a pre-filing order, before the question of whether petitioner was "*in custody*" pursuant to *Title 28 U.S.C. § 2254* was heard on appeal.

The application for a writ of habeas corpus filed in the district court presented evidence of the Governor of California, the Attorney General of

California, the Sheriff and District Attorney of Sacramento County, the City of Elk Grove, the Public Defender of Sacramento County, and other persons agreeing to allow one another to use the Superior Court of California, County of Sacramento to convict petitioner of a crime he did not commit to punish him because he was African American and was exercising and asserting his rights secured by *Title 42 U.S.C. §§ 1981, 1982, and 2000.* While initiating the criminal prosecution State law enforcement officers committed the following criminal offences against petitioner: kidnapping, armed robbery, burglary, extortion, forgery, perjury, and fraud. The unconstitutional actions of officers of the State of California, in initiating and prosecuting the underlying criminal action were of such constitutional magnitude that they led to a trial so fundamentally unfair that absent the unconstitutional conduct no reasonable judge or jury would have convicted petitioner. Petitioner is actually innocent of the crime which he was convicted. In a case such as this, a fine, probation or any collateral consequences no matter how small or insufficient would violate the Constitution and deprive a person of their liberty without due process of law. *Title 28 U.S.C. § 2254* should apply in this matter. *In re Clark (1993) 5 Cal 4th 750* and *In re Robbins 18 Cal 4th 770. App.* *

These issues are presented clearly and in a straight forward manner by this case. No extraneous

or collateral questions mire the case. No one contests that the conviction and sentence violates the Constitution and laws of the United States and obligates petitioner to pay $100.00 restitution fine as a condition of his probation and no one denies the fact that petitioner has not paid the $100.00 restitution fine. There is clear and convincing evidence that but for the constitutional error in the California Court of Appeal For The Third Appellate District, the result of the appeal would have been different. The United States Court of Appeal are divided on this issue of "*in custody*" as it pertains to restitution fines. The issue of a restitution fine should be settled by this Court. This Court should take this opportunity to address these important issues in this clear case. Each point is explained in greater detail below.

The evidence in this action and facts that can be judicially noticed demonstrates that from 1997 until the present petitioner has been denied and/or cannot enforce in the Court of the State of California rights under the Constitution and laws of the United States providing for equal rights of citizens of the United States in that, among other things, the State of California by statute, custom, practice, and a formal expression of state law supports and maintains a policy of discriminating against African Americans on the grounds of their race and color. In this action the People of the State of California caused petitioner to be arrested and charged him with two violent

felonies solely because petitioner was African American, and lawfully stopped two European American men from unlawfully taking his property and assaulting his family. The mere existence of the criminal judgment at issue here without more, is depriving petitioner of his rights secured by *Title 42 U.S.C. §§ 1981, 1982, and 2000*, in that petitioner had a federal constituted right to engage in the conduct which was the basis for the State Court's judgment and had a further statutory right that no state should even attempt to prosecute him for his conduct. See *Georgia v. Rachel 384 US 780*; *McGee v. the People Civ. S-04-0283 GEB KJM PS*; *McGee v. CA State Senate et. al., 2007 U.S. Dist, Court LEXIS 6019*; also *McGee et. al. v. Wilson et. al., No. Civ. S-1026 FCD PAN PS.*

The unconstitutional actions of the State of California, her officers, legislature, municipalities, agencies and people have been documented in the trial courts, appellate courts and the Supreme Courts of both the United States and the State of California. As a direct consequence of the State of California's policy of discriminating against African Americans on the grounds of race in law enforcement programs and activities, petitioner has filed petitions, appeals, and complaints in eight separate courts. Although some cases may have been held to be frivolous or meritless and led to the Ninth Circuit Court of Appeals to impose a pre-filing order on petitioner, all papers

petitioner has filed with the courts have been filed simply to prevent the State of California from continuing to deny him and his family liberty and the pursuit of happiness without due process of the law. In most of the cases petitioner filed documents under extreme duress because state law enforcement officials and private citizens were using intimidation by threats of violence to deter petitioner from being a party to the action. The duress interfered with petitioner's ability to adequately research and prepare documents to be filed in the courts and have caused some cases to be dismissed. The conduct of the State of California toward petitioner and his family is vexatious and should be stopped by this Court.

Since October 15, 1997, when petitioner filed an application for a restraining order in the Superior Court of California County of Sacramento the Governor, Attorney General and the Legislature of the State of California, along with several municipalities, agencies, and people have interfered with the orderly administration of justice in the Courts by conspiring to or aiding and inciting other persons to commit the following wrongs against petitioner and his family: attempted murder; kidnapping; attempted kidnapping; torture; malicious prosecution; robbery; burglary; breaking and entering into petitioner and his family's property; perjury; forgery; unlawful sexual conduct; and unlawful search and seizure, causing petitioner and his family to lose

income. The Court of Appeals' pre-filing order would have never been needed if officers of the State of California would have respect for the dignity and authority of the United States Courts and the Courts of the State of California. This Court should take this opportunity to protect the public and the Courts dockets from the criminal actions of officers of the State of California. See *McGee et. al., v. Seagraves et. al., No. Civ. S-06-0495 MCE GGH PS; McGee v. MMDD et. al. No. Civ. S-05-0339 WBS DAD PS;* and *McGee v. CA State Senate Supra.*

In this case the People of the State of California initiation, prosecution and maintaining of the judgment in the underlying criminal action is patently insubstantial and clearly not controlled by settled precedent. Petitioner would go so far as to say the facts the People of the State of California relied on to obtain the judgment were fanciful and conflicted with the facts this Court could take judicial notice. First of all the underlying criminal prosecution was patently insubstantial. California law clearly allows a person regardless of his race or color to use moderate means to eject trespassers from their residence. *People v. Miller 72 CA 607.* The evidence in the criminal prosecution shows that petitioner used moderate means to eject the tow truck driver off his residence and thus the judgment clearly contradicts settled precedent as set out in *People v. Miller Supra.* Also, the judgment is in conflict with settled precedent of

this Court as mandated by *Tumey v. Ohio (1926) 273 US 522.* In *Tumey* this Court prohibited a prosecutor from prosecuting a defendant with which they were embroiled in civil litigation. In this action both the Attorney General and the District Attorney were embroiled in civil litigation with petitioner when they initiated, prosecuted and obtained the judgment at issue here. The prosecutors had a direct and personal interest in convicting petitioner of the crime and later used the judgment as evidence against petitioner in a civil action. See *McGee v. CA State Senate et. al. Supra.* It is clear that the judgment is unconstitutional and illegal and therefore to allow the State to enforce the judgment pursuant to the laws of the State of California would also violate the Constitution and laws of the United States. See *Cal. Penal Code § 1214(a).*

> Second, Title 42 U..C. § 2000a-2 states:
> *No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by [42 USC §§ 2000a, 2000a-1] or (b) intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by [42 USC §§ 2000a, 2000a-1] or punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by [42 USC §§ 2000a, 2000a-1].*

The People of the State of California admitted in the United States District Court in the matter of *McGee v. the People of California Supra* that they "caused [petitioner] to be arrested and charged him with two violent felonies, solely because [petitioner] is [African American] and lawfully stopped two [European American] men from unlawfully taking his property and his wife or otherwise enforcing his rights secured by *Title 42 U.S.C. §§ 1981, 1982, and 2000.*"[2] There is no dispute that the People of the State of California obtained the judgment to punish petitioner for exercising his rights secured by *Title 42 U.S.C. §§ 1981, 1982, and 2000.* This Court held in *Georgia v. Rachel 384 U.S. 780,* that the burden of having to defend oneself from prosecution such as the one at issue here would "itself constitute a denial of a right conferred by the Civil Rights Act of 1964." In this case the burden of being obligated to pay the $100.00 restitution fine and the burden of having an unlawful judgment recorded into the public record would necessarily constitute a denial of a right conferred by *Title 42 U.S.C. §§ 1981, 1982, and 2000* and should represent an unlawful restraint on petitioner's liberty.

So what is the relevance of this discussion for the issue raised by this case? It is as simple as this:

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[2] The People of the State of California did not dispute the allegations of petitioner's petition of removal filed in the district court.

there is an unconstitutional and unlawful judgment petitioner must pay $100.00 to satisfy. The statute at issue here was designed to correct the effects of unconstitutional and unlawful judgments. It accentuates the importance of the issue needing clarification. The question is whether the words of congress and the decisions of this Court mean what they say or whether they may be construed is such a manner as to allow a state to punish a person for exercising and asserting their rights secured by *Title 42 U.S.C. §§ 1981, 1982 and 2000.* This Court should issue the writ to decide this important issue.

At the same time, the question of whether restitution fines reach the threshold to meet the "*in custody*" requirement of *28 U.S.C. § 2254 and 2255* are becoming more prevalent amongst the several United States Court of Appeals. See *Williamson v. Gregoire 155 F 3d 1180 (9th Cir. 1998)* and *Blaik v. United States 117 F 3d 1288 (11th Cir 1997).* While these cases are not identical what is clear is the need to define the "*in custody*" requirement as it relates to a restitution fine. Resolving this issue will bring clarity to the debate at least on this one point. This Court should do so.

The United States Court of Appeals for the Ninth Circuit has thus far passed on the issue. The reasoning of the Ninth Circuit was based on its opinion in *Williamson v. Gregoire 151 F. 3d 1180,*

1183 which reached the conclusion that a restitution fine does not satisfy the in custody requirement. The opinion of the United States Court Of Appeals In And For The Eleventh Circuit in *Blaik v. United States Supra* contains dicta contrary to the opinion of the Ninth Circuit in *Williamson v. Gregoire Supra*. In *Blaik v. United States Supra* the Eleventh Circuit used *Hughey v. United States 495 U.S. 411* as authority. *Hughey Supra* held that a restitution should be limited to the losses caused by the offence. Although *Hughey* was pertaining to a federal criminal action, the principal should be no different in a state court criminal action. In this case since the judgment and conviction are unconstitutional and unlawful it would follow there would be no losses caused by an offence and therefore the restitution must be unlawful, according to this Court's ruling in *Hugley Supra*.

Respectfully, the Ninth Circuit Court of Appeals missed two important points. First, they never analyzed the importance of Congress' purpose behind the statute. As discussed above, this Court has held the writ of habeas corpus to be dynamic in its scope which purpose is to protect individuals against the erosion of their rights to be free from wrongful restraint upon their liberty *Jones v. Cunningham Supra*. If this Court had meant "probation" not to satisfy the "in custody" requirement under the unexpired sentence then it would have said so. At

minimum, something more than a holding that "the Court does not assume that simply because petitioner has refused to pay the restitution fine that petitioner is still on probation." is needed to settle the in custody issue in the Courts of Appeals. The Ninth Circuit Court of Appeals decision conflicts with this Court's decisions set out above and should be reviewed by this Court.

Finally, it is worth mentioning again that the judgment was obtained contrary to well settled precedent of this Court and the California Supreme Court in the cases of *Tumey v. Ohio Supra* and *the People v. Miller Supra*. The prosecution and acquiring of the judgment in the underlying criminal action was also forbidden by the Court in the matter of *Georgia v. Rachel Supra*. The appellate procedure violated petitioners rights secured by the Sixth and Fourteenth Amendments of the United States Constitution. *Anders v. California Supra* and *Strickland v. Washington Supra*. Thus, the Sacramento County conviction of petitioner for brandishing a weapon is clearly illegal. The judgment is part of the public record and has collateral consequences which has effected petitioner's ability to possess a handgun, to gain employment, to obtain business licenses and has and continues to damage petitioner's business reputation. Other people in this country do not have to be subjected to the defamation that petitioner is being subjected to by the existence of

the criminal judgment in the public records which was obtained against petitioner for a crime he did not commit. It is precisely this type of restraints of liberty the habeas corpus statutes were enacted to prevent.

Thus, the need for this Court to exercise its discretion and review this case is clear. This Court in absolute terms held that a person on probation is in custody as required by *28 U.S.C. § 2254*, yet the Ninth Circuit Court of Appeal including the United States District Court for the Eastern District of California, have held that a restitute fine ordered as a condition of probation does not satisfy the in custody requirement. The only explanation given is that the Court can't assume petitioner is in custody because he refused to pay a restitution fine. One wonders how the Attorney General of California, Edmund G. Brown Jr. could have evidence of the Sacramento County Sheriff and District Attorney's offices, malicious prosecution, falsification of evidence, coercion of perjured testimony, and concealment of exculpatory evidence and allow them to go unpunished although he is required by state law to supervise their conduct. Any competent attorney general would have initiated criminal prosecution against the sheriff, district attorney, former governor, and former attorney general.

This Court should issue the writ and address this important issue. The several United States Court

of Appeal could use this Court's guidance in this issue. Whether the word of this Court and Congress mean what they say, and the rights of citizens, hangs in the balance. The writ should issue.

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: July 7, 2010

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Case: 2:10-cv-00137 KJM

IN THE UNITED STATS DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JEFFERSON A. MCGEE,
Petitioner, No. CIV S-10-0137 KJM P

vs.

ATTORNEY GENERAL STATE OF CALIFORNIA,
Respondent. ORDER TO SHOW CAUSE

_____/

Petitioner, a states prisoner proceeding pro se, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has paid the filing fee.

Petitioner challenges a Sacramento County conviction for brandishing a weapon. On May 16, 2005, petitioner plead guilty and was ordered to serve three years probation. Pet. At 2:1-6. Nothing before the court indicates the term of probation was revoked or extended. This action was filed on January 19, 2010. Petitioner has identified his address as being a residential address in Sacramento.

This court has jurisdiction to hear a 28 U.S.C. § 2254 petition only if the petitioner is in state custody and if he alleges he is in custody in violation of federal law, or the length of his sentence violates federal law. Nothing before the court suggests that when this action was commenced petitioner was in custody, on probation, or on parole. Rather, it appears he has been discharged from his sentence. Therefore, this case must be dismissed. See Maleng v. Cook 490 U.S. 488, 4902-91 (1989).

Good cause appearing, IT IS HEREBY ORDERED that petitioner show cause within twenty-one days why this action should not be dismissed for lack of jurisdiction.

Dated: February 12, 2010.

Kimberly J. Muller

U.S. MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JEFFERSON A. MCGEE,
Petitioner, No. CIV S-10-0137 KJM P

vs.

ATTORNEY GENERAL STATE OF CALIFORNIA, ORDER
Respondent,
_____/

Petitioner is proceeding with an application for writ of habeas corpus under 28 U.S.C. § 2254. On February 12, 2010, the court ordered petitioner to show cause why this matter should not be dismissed for lack of jurisdiction because petitioner was not "in custody" when he commenced this action on January 19, 2010, as is explicitly required in § 2254. Petitioner filed his response on March 1, 2010.

In his response, petitioner indicates he has refused to pay a $100 restitution fine he was ordered to pay when he was placed on three years probation on May 16, 2005. See pet. Ex. A at 167.[1] Petitioner asserts his refusal to pay the restitution fine means he is still on

[1] Page numbers are those assigned by the court's electronic docketing system.

probation and therefore still "in custody." See United States v. Spawr Optical Research Inc., 864 F. 2d 1467, 1470 (9th Cir. 1988) (habeas petitioner "in custody" for purposes of § 2254 if on probation.) However, the court does not assume that simply because petitioner has refused to pay the restitution fine that petitioner is still on probation. At least one California statute indicates that probation may end with the probationer having not paid a court-ordered restitution fine in full; upon expiration of a probation term, the unpaid fine may be reduced to a money judgment. See Cal. Penal Code § 1214(a).[2]

Petitioner also asserts that the "collateral consequences" from the conviction, such as not being able to possess a gun, rendered him "in custody" at the time he commenced this action. This argument has been rejected by the Ninth Circuit. Williamson v. Gregoire 151 F. 3d 1180, 1183 (9th Cir. 1998).

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[2] Penal Code Section 1214(a) provides, in pertinent part: "If the judgment is for a fine, including a restitution fine...with or without imprisonment... the judgment may be enforced in the manner provided for the enforcement of money judgments generally. Any portion of a restitution fine or restitution fee that remains unsatisfied after a defendant is no longer on probation or parole or has completed diversion is enforceable by the California Victim Compensation and Government Claims Board pursuant to this section..."

Because Petitioner has failed to show that the court has jurisdiction over his application for writ of habeas corpus, this action will be dismissed.

In accordance with the above, IT IS HEREBY ORDERED that:

1. This action is dismissed; and
2. The court declines to issue the certificate of appealability referenced in 28 U,S,C, 2253.

Dated: March 31, 2010

_____

U.S. MAGISTRATE JUDGE

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FILED
MAY 20 2010
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: JEFFERSON A. MCGEE, No. 02-80037

Respondent. DC# CV-10-137-KJM

Eastern California

ORDER

Before: LEAVY, RAWLINSON and CALLAHAN, Circuit Judges.

This court has reviewed the notice of appeal and accompanying documents filed April 22, 2010 in the above-referenced district court docket pursuant to the pre-filing review order entered in this docket. Because the appeal is so insubstantial as to not warrant further review, it shall not be permitted to

proceed. *See In re Thomas,* 508 F. 3d 1225 (9th Cir. 2007).

A copy of this order served on the district court for the Eastern District of California shall constitute the mandate of this court.

No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submission shall be filed or entertained in this closed docket.